TAN WAT YAN

v.

KONG CHIEW MENG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATUK HAJI MOKHTAR BIN HAJI SIDIN J.
[DIVORCE PETITION NO. S1-33-700-92]
21 FEBRUARY 1994

FAMILY LAW: Petition for divorce - Adultery - Whether proved - Whether act of adultery condoned by petitioner - Whether it was impossible for petitioner to live with respondent.

FAMILY LAW: Petition for divorce - Damages for adultery against co-respondent - Principles applicable - Law Reform (Marriage and Divorce) Act 1976 s. 58(3)(b).

FAMILY LAW: Custody of adopted child - Factors for consideration - Civil Law Act 1956 - Matrimonial Causes Act 1973 (UK).

This was a petition by the petitioner against her respondent husband for divorce on the ground of adultery with the co-respondent, as well as for damages against the co-respondent and custody of a child adopted earlier by the petitioner and the respondent.

The evidence showed that at the time of marriage the petitioner was working as a nurse in Petaling Jaya while the respondent was a doctor attached to the General Hospital, Ipoh. The respondent later left the government medical service and started working at a clinic in Kepong, Kuala Lumpur, in which he later became a partner. It was evident that throughout these early years of their marriage the petitioner had been supporting the respondent materially, even to the extent of providing the matrimonial home which she bought through a government loan.

While working at the clinic, the respondent picked up an extra-marital affair with the co-respondent who was a nurse at the same clinic. This led to marital problems between the petitioner and the respondent, resulting in the respondent leaving the matrimonial home, and the petitioner, and went to live with the co-respondent. Out of this co-habitation the respondent and the co-respondent have three children.

Both respondents admitted adultery but contended, in an attempt apparently to answer the claim for damages, that the first adultery could have been and was committed only after the respondent's seperation with the petitioner, and not before that, as their first child was only born more than one year after the respondent left the petitioner.

The facts further showed that prior to their seperation aforesaid, the petitioner and the respondent, who had no child of their own, had adopted a child. The child had been living with the petitioner but was removed from the petitioner's house by the respondent's mother without the petitioner's consent. Hence the further claim for custody by the petitioner.

Held:

[1] On the evidence it is clear that the respondent had committed adultery with the co-respondent during the subsistence of his marriage to the petitioner. The law is clear that once adultery is proved it affords a ground for divorce if the Court is satisfied that the petitioner did not condone the said act of adultery and that it is impossible for the petitioner to continue to live with the respondent. In this case both these conditions had been fulfilled by the petitioner and she is therefore entitled to the divorce she had petitioned for.

[2] The time when adultery was committed is not at all important in determining damages to be awarded against the co-respondent. Under the law, once adultery has been proved, the petitioner is entitled to damages against the co-respondent although the quantums thereof will depend on the losses and sufferings of the petitioner due to the said adultery. The evidence here showed that the co-respondent came and took the respondent away from the petitioner at a time when the respondent had already had a steady income and had established himself as a medical practitioner. It was also evident that the petitioner, in her dissappointment, had resigned from her post and left for Singapore after realising that the respondent had left for good and was not coming back to her. In the circumstances an award of RM70,000 seems fair and appropriate.

[3] The fact that the respondent's mother had been taking care of the child is not a ground to award the custody of the child to the respondent. In deciding the question of custody, the Court has to bear in mind, among others, the welfare of the child, which is the paramount consideration, the conduct and characters of the parties, the circumstances of the separation, as well as the income of the claiming parents.

[4] The respondent by his conduct has clearly shown to have the inclination of devoting more time to his three other children and it is clear that the adopted child herein would not be staying under the same roof even if custody is given to him. On the other hand, the petitioner is even prepared to resign from her post as a nurse in Singapore in order to devote her time fully to the child. In addition the fact that the child had been taken out of the petitioner's house without her consent tilts the balance further in the petitioner's favour. In the circumstances, the petitioner will have custody of the child with reasonable access to the respondent.

[Petition granted. Order accordingly].

Case referred to:
Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 MLJ 51 ***(foll)***

Legislation referred to:
Civil Law Act 1956
Law Reform (Marriage and Divorce) Act 1976, s. 58(3)(b)
Civil Law Act (UK)
Matrimonial Causes Act 1973 (UK)

For the petitioner - Low Hop Bing; M/s. Low Hop Bing & Associates
For the respondents - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.

JUDGEMENT

Haji Mokhtar Bin Haji Sidin J:
This is a petition for divorce by one Tan Wat Yan (hereinafter referred to as "the petitioner") against her husband by the name of Dr. Kong Chiew Meng (hereinafter referred to as "the respondent"). According to the affidavits filed for the purposes of this petition it appears to me that the respondent is not resisting the petition for divorce and in fact supported the petition for divorce. The petition is not as simple as it appears to be in view of the claim for damages by the petitioner against one Chee Yoke Moi (hereinafter referred to as the "co-respondent"). The petitioner cited adultery as one of the grounds for divorce. The adultery was committed by the respondent. Both the respondent and co-respondent admitted the adultery and also admitted that they have lived together for the past few years before this petition. As a result of the adultery the respondent and the co-respondent have three children. The petitioner also prays for the custody of a boy by the name of Kong Hong Swin (hereinafter referred to as the "child"). It is common ground that the child was adopted by the petitioner and the respondent and becomes the child of the family.

The petitioner and the respondent were married on 14 December 1977 and the marriage was registered at the Registry of Civil Marriages at Kinta, Perak. At the time of the marriage the petitioner was working as a nurse at the University Hospital, Petaling Jaya and the respondent was working as a doctor at the General Hospital, Ipoh. As a result of the marriage the petitioner resigned from her post as a nurse at the University Hospital and joined the government service as a nurse. Eventually she was posted to the General Hospital, Ipoh in order to be near the respondent. When she was posted to Ipoh, the respondent was posted to a health clinic at Batu Kurau some distance away from Ipoh. The petitioner remained at Ipoh. At the beginning she was staying with the respondent's mother but later moved out to a rented room which according to her to be near the General Hospital, Ipoh. It was not disputed that whenever the respondent returned to Ipoh the petitioner would go back to the respondent's house in order to be with him. The respondent was re-posted to Ipoh and soon after he resigned from the government service.

After resigning from the government service the respondent left Ipoh and went to Petaling Jaya to work at a clinic. His mother and brothers followed and stayed with him in Petaling Jaya.

The petitioner who was attached to the General Hospital, Ipoh was left in Ipoh. Eventually the petitioner was transferred to the General Hospital, Kuala Lumpur and she moved in to stay with the respondent and his family. By that time the repondent was working at a clinic in Kepong. He brought one of the partners' share at that clinic and became one of the two partners of the clinic. The respondent admitted it was a hard time for him since he had to pay for the partnership. Both the petitioner and the respondent agreed that the petitioner purchase a house using her entitlement for a government loan. They moved into the house and the respondent's family followed. It was obvious that there was no child from the marriage. There was a suggestion from the respondent that he fathers a son from another women. According to the respondent the petitioner at first agreed but later changed her mind. The petitioner denied that she consented to this. Later on the petitioner told the respondent that she came to know of a child born at the General

Hospital, Tampin ready for adoption. Both of them and the respondent's mother went to see the child and agreed to adopt the child. They even went to the extent of registering the child as their own, *viz.* the petitioner as the mother and the respondent as the father. This was done by the respondent. As such the child now became the child of the family.

The respondent alleged that the petitioner was not a good mother because she did not take good care of the child and it was his mother who took care of the child. From the evidence it is clear to me that both the petitioner and the respondent were pursuing their separate careers. The respondent was working hard to pay for the partnership of the clinic which he bought and he even worked on night shifts in Petaling Jaya. The petitioner was attending a course which required her to be at the hospital when she had to be on night duty. Since both of them had little time to spend in the house the child was left in the care of the respondent's mother who appeared to be very free so much so she could attend "tai chi" and lion dance classes. It was not denied that whatever little time she had at the house the petitioner tried to look after the child to the best of her ability. It was obvious to me that she was inexperienced in this. It was at about this time that trouble started between the petitioner and the respondent.

From the evidence it is clear to me that the relationship between the petitioner and the respondent's family, especially his mother, was not good. The respondent knew about this but made no attempt to remedy the situation such as by staying separately from the mother. Wherever he went he would take the mother first. All the time until recently the mother was always with him. The petitioner gave evidence that when the respondent bought the clinic at Kepong she heard rumours that the respondent had an affair with the co-respondent who was working at the same clinic. The petitioner also gave evidence that there was a wedding dinner for him and the co-respondent. The respondent admitted there was a dinner but denied it was a wedding dinner. It is clear to me from the evidence that the co-respondent was working at the clinic in Kepong when the repondent joined the clinic. Some time later it appears from the evidence of the respondent that the co-respondent left the clinic. This was before the purported wedding dinner. It was at about this time that the respondent suggested to the petitioner that he fathers a child from another woman. When the petitioner confronted the respondent about the dinner the respondent left the house and went to stay with the co-respondent. About a year later both the respondent and the co-respondent admitted the first child was born to them. Up to the date of hearing there are already three children from the relationship. The learned Counsel for the respondent pointed out to me that the first child was born more than a year after the respondent left the petitioner and conceivement of a child in the normal circumstance is nine months plus and as such it was not possible that the respondent was married to the co-respondent on the date when the wedding dinner took place because the dinner took place more than a year before the first child was born. I am not impressed by the argument. To me it is clear that the existence of a marriage will not necessarily lead to the immediate conceivement of a baby. Whatever it is it appears to me that there was already a relationship in existence between the respondent and the co-respondent before the respondent left the petitioner. From the evidence it is also clear to me that during the subsistence of the marriage between the petitioner and the respondent, the respondent had committed adultery with the co-respondent. This was not denied by the respondent or the co-respondent. The only point raised by the respodent and the co-respodent is when was the first adultery committed. In my view this is not important at all to determine the damages to be awarded against the co-respondent.

From the authorities it is clear to me that once adultery is proved then it is a ground for divorce if the Court is satisfied that the petitioner did not condone the act of adultery by the respondent and that it is impossible for the petitioner to continue living with the respondent. From the evidence given in this case it is clear to me that the petitioner did not condone the act of adultery committed by the respondent. From the evidence also it is not difficult for me to conclude that the petitioner could not possibly continue living with the respondent. This had been going on for the last 7-8 years.

With that I am statisfied that the petitioner had proved that the respondent had committed adultery with the co-respondent. The petitioner is therefore entitled to the divorce on the ground that she has petitioned.

What is the effect of the adultery which has been proved against a co-respondent. Section 58(3)(b) of the Law Reform (Marriage and Divorce) Act 1976 provides as follows:

> (3) where damages have been claimed against a co-respondent:
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> (a) ...
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> (b) if, at the conclusion of the hearing, the Court is satisfied that adultery between the respondent and co-respondent had been proved, the Court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.

It is clear from that section that the Court may award damages against the co-respondent once adultery has been proved. The element of damages in my view depends on the circumstances and the losses suffered by the petitioner due to the adultery. Though Counsel for the respondent and co-respondent had taken pains to show to the Court that the adultery was committed after the separation, it is not the sole question to determine the amount of damages. One has to consider the losses and the sufferings of the petitioner due to the adultery. From the evidence I am satisfied that the adultery was committed before the respondent left the petitioner.

From the evidence it is not wrong for me to conclude that there were family squabbles between the petitioner on one part and the respondent and his family on the other part. From the evidence it is clear to me that the petitioner also suffered when the respondent wanted to start his private practice. She helped the respondent in maintaining the household and even went to the extent of taking a government load to purchase a house in order for her and the respondent to stay. The respondent's family also stayed in the same house. I could not help but conclude that when the respondent left the government service he was a man with little means so much so he had to work day and night to purchase a half share in the clinic. All this time the petioner was always by his side. The respondent himself admitted this when he said he had to work at two clinics in order to pay for the buying of a half share in the clinic. When the respondent had established himself and it appears to the Court that he had steady income the co-respondent came along and took the respondent away from the petitioner. For that I am of the view that the petitioner had suffered losses and means. She was so disappointed that she resigned from her post and left for Singapore when she realised that the respondent was not coming back at all. For that I am of the view that the petitioner is entitled to damages against the co-respondent. Taking the position of the stability of the respondent and the suffering by the petitioner I am of the view that the sum of RM70,000 is a fair figure.

Let me now turn to the issue of custody of the child, Kong Hong Sin. It is clear to me that the child was adopted by the petitioner and the respondent. Both of them went to the extent of registering the birth of the child as being born to them. This is evidenced by the birth certificate. The information given in the certificate was given by the respondent. From the evidence the child was adopted on the suggestion of the petitioner. The petitioner informed the respondent that there was a child born at the Tampain General Hospital ready for adoption. The petitioner, respondent and the respondent's mother then went to Melaka to the house of the petitioner's sister where the child was kept. After seeing the child the petitioner and the respondent decided to adopt the child. The status of the child as an adopted child of the petitioner and respondent is not clear under our law. However, applying the Civil Law Act, the law applicable in England is applicable here.

In the Matrimonial Causes Act 1973, "child" in relation to one or both of the parties to a marriage, includes an illegitimate or adopted child of that party, or, as the case may be, of both parties. "Child of the family", in relation to the parties to a marriage, means a child of both of those parties. As such in my view the said Kong Hong Sin is the "child of the family" of both petitioner and the respondent.

In the present case both the petitioner and respondent are requesting for the custody of the child of the family. It is established principles that the Court, in deciding the question of custody, must take into consideration the welfare of the child as the first and paramount consideration, and must not take into consideration whether from any other point of view of the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. From the authorities I have read it is clear to me that the Court has to consider the relevant factors including the conduct of the

parties and their characters. There is no hard and fast rule that could be laid down based on the sex of the parent and child though the Court is more inclined to award the custody of a child of tender age, *viz.* about six years and a girl below 14 years to the mother. Thus circumstances of the separation between the husband and the wife has some significance and also the income of each parent.

The respondent had given evidence at great length to show that the petitioner is incapable of bringing up the child. He even went to the extent of stating that when the petitioner took care of the child she hurt the child. The respondent knows that the petitioner, just like him, is a career woman who had little time to spend in the house. For that reason the respondent's mother took care of the child. From his own evidence it is clear to me that the respondent himself had little time for the child. He spent most of the time working in order to earn more money. He himself left the caring of the child to his mother. It must be remembered that the right to custody is between the petitioner and the respondent and not the respondent's mother. The respondent himself gave evidence that he had asked his mother and the child to move out from the house where he is staying with the co-respondent and their three children. His reason was that the house was too small. Is that the only reason or was it something else? Was it because he wants to devote more time with the three children he had with the co-respondent. Whatever the reason it is clear to me that the child would not be under the same roof with him even if custody be given to him. It is also clear to me that he could not devote his time to the child and his devotion is totally divided.

On the other hand the petitioner had stated that she wants the custody of the child and in doing so she is willing to resign from her post as a nurse in Singapore in order to devote her time to the child. She admitted that for the last three years she met the child twice not because she wanted to see him twice only but because she was not allowed to meet the child by the respondent. She stated she met the child twice after pleading with the respondent. This was denied by the respondent. Anyway it was admitted by the respondent that the child was taken away from the house by the respondent's mother even before the respondent left the petitioner. As such it appears to me that no opportunity whatsoever was given to the petitioner to look after the child. This appears to confirm her version that she was forbidden to see the child by the respondent. Though the respondent's mother had been taking care of the child it is not a ground to award the custody of the child to the respondent as stated in the case of *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 MLJ 51.

In that case the parties were divorced, the appellant wife having obtained the decree on the ground of husband's cruelty. The Judge made an order the custody of the child to be given to the husband taking into account the fact that the wife was not working and had no income and the child had been looked after most of the time by the husband's mother. On appeal the wife contended that the respondent had frustrated her wishes to bring up the child herself. The wife was forced to leave the matrimonial home and the circumstances did not show any intention on her part to abandon the child. The Court of Appeal reversed the decision of the learned trial Judge and awarded the custody of the child to the wife.

The facts and circumstances of that case is more or less similar to the present case. One factor in the present case is more in favour of the petitioner, that is the child was taken out of the petitioner's house without the consent of the petitioner. Taking into consideration the whole case I am of the view that the custody of the child, Kong Hong Sin, be given to the petitioner with reasonable access to the respondent. This order appears to be harsh to the child at the beginning since it will be painful separation for the child and the respondent's mother, but in the long term it is better for him to be with the petitioner who could give him her love.

With that I will make the following order:

(a) *Decree nisi* to be made absolute after three months.

(b) Co-respondent to pay RM70,000 as damages to the petitioner.

(c) Custody of the child, Kong Hong Sin, to the petitioner with reasonable access to the respondent.

(d) Costs to be paid by the respondent to the petitioner.